Waterfront Services Co. *and* Timothy Brown, Daniel Stucker, Louie Housman, Frank Davis, *and*-Laborers' International Union of North America, Local 773, AFL–CIO. Cases 14–CA–27001–1, 14–CA–27001–2, 14–CA–27001–3, 14–CA–27001–4, and 14–CA–27018

December 19, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 11, 2002, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Waterfront Services Co., Cairo, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1 (c) and renumber the following paragraph accordingly:

(c) Discharging or otherwise discriminating against any employee for filing, or taking steps to file, charges with the Board.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 19, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in surveillance of your activities on behalf of Laborers' International Union of North America, Local 773, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Laborers' International

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to pass on the judge's finding that the Respondent engaged in surveillance of employees' union activities on March 20, 2002, because that finding would be cumulative to the surveillance violation that the judge found occurred on January 19, 2002, and would not affect the remedy in this matter. Therefore, contrary to the judge, we do not rely on the finding regarding the March 20 incident as support for finding that the General Counsel met his initial burden with respect to the 8(a)(3) and (4) allegations. In finding animus, we do rely, however, on the judge's finding that the Respondent's proffered business justifications for the discharges were pretextual. See *Loudon Steel, Inc.*, 340 NLRB No. 40, slip op. at 6 (2003).

In finding that the Respondent knew of the discriminatees' protected activities, Member Schaumber does not rely on the third reason given by the judge, i.e., that Guetterman, Respondent's human resources administrator and a member of its board of directors, saw the entire videotape of the March 20, 2000 meeting at Harpers and was therefore aware of discriminatees Housman, Brown, and Stucker's attendance and of Houseman's speaking out in support of the Union.

[3] We have modified the recommended Order and notice to accurately reflect the violations found.

Union of North America, Local 773, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for filing, or taking steps to file, charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their discharges will not be used against them in any way.

WATERFRONT SERVICES CO.

Catherine Ventola, Esq., for the General Counsel.
Terry Potter, Esq. and Christopher Berg, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in St. Louis, Missouri, on October 15 and 16, 2002.[1] On September 11, a consolidated complaint issued based upon unfair labor practice charges and amended charges filed on July 2, 3, 8, and 15, and August 26, by Timothy Brown, Daniel Stucker, Louie Housman, Frank Davis, and Laborers' International Union of North America, Local 773, AFL–CIO (Union) against Waterfront Services Co. (Respondent). Respondent filed a timely answer.

It is alleged that on January 19 and March 22, Respondent engaged in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act. It is further alleged that on June 20, Respondent discharged Housman, and on June 25 discharged Stucker, Brown, and Davis because of their support for and activities on behalf of the union in violation of Section 8(a)(1) and (3). It is alleged Stucker and Brown's discharges also violated Section 8(a)(4). Respondent denies that it engaged in unlawful surveillance, and avers that it discharged all four employees for lawful, nondiscriminatory reasons.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits and I find the union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's business and history of collective bargaining

Respondent is engaged in the business of providing fleeting services for barges in transit on the Mississippi and Ohio Rivers. It maintains an office and a waterfront terminal in Cairo, Illinois, and employs 84 employees. Geoff Smith has been Respondent's president for 7 years and is a member of the board of directors. Deborah Guetterman is the human resources administrator and has been a member of the board of directors since the summer of 2000. David Jackson is the crew manager and supervises deckhands and pilots. Chris Smith is the dock manager and supervises laborers, welders, and crane operators. Geoffrey Smith and Chris Smith are admitted supervisors and agents of Respondent, and Guetterman is an admitted agent of Respondent.

From 1967 until 1993, the union represented Respondent's employees. During that time, Ed Smith was president and chairman of the board for Respondent. At the same time, he was president and business manager for the union. Ed Smith is also Geoff Smith's uncle.[2] In June 1993, the Regional Director, Region 14, issued a complaint alleging, inter alia, that Respondent was dominating and interfering with the administration of the union in violation of Section 8(a)(2). Respondent entered into an informal Board settlement agreement agreeing to withdraw recognition from the union and to refrain from recognizing the union until such time as it was certified. Ed Smith apparently divested his interests in Respondent but continued to serve as an officer of the union.

In April 1999, Geoff Smith approached Ed Smith about the possibility of Respondent and the union entering into a collective-bargaining relationship so that Respondent could utilize the union's hiring hall and training programs. Ed declined. In an apparent reversal of positions, in August 2000, and again in the summer of 2001, Ed demanded recognition for the union and Geoff declined. Ed said he was declaring war on the company.

In October 2001, Ed demanded to be put back on the board of directors and threatened that if his demand were not met, he would use his position with the union as well as his political resources to harm the company. Geoff took the proposal to the other members of the board, which included Guetterman. None

[1] All dates are in 2002 unless otherwise indicated.

[2] To avoid confusion, I will refer to Geoff Smith, Ed Smith, and Chris Smith either by their first names or full names. There is no familial relationship between Chris Smith and Geoffrey and Ed.

of the members welcomed the idea, but they elected Ed to the board because of his threat. Thereafter, the board learned that Ed was attempting to find a buyer for the company, and in January 2002, Respondent's administrative committee, which included Guetterman, removed Ed from the board. He has not held any position with Respondent since that time.

B. Housman, Stucker, Davis, and Brown's employment histories

Housman was employed by Respondent for 29 years, first as a deckhand, then as a tugboat pilot. In the final 6 years of his employment, Housman operated a tug called "The Doug Franklin." Housman was responsible for patrolling the river to inspect barges owned by other companies. If he observed repairs that needed to be performed, he relayed that information to Chris Smith who, in turn, contacted the owner of the barge to solicit the business. Other than being involved in a tug accident 20 years ago, Housman was never reprimanded or disciplined in the 29 years of his employment. Chris testified Housman was a valued employee who was highly respected in the business, and that his work performance had always been satisfactory. Following his discharge, Housman went to work for the union as an organizer.

Davis was employed by Respondent for 26 years, as a deckhand, tankerman, and finally as a dockworker. Like Housman, Davis was represented by the union from the time he was first employed until in or about 1993. There is no evidence that he was ever disciplined or that his job performance was less than satisfactory.

Brown was employed for 10 years as a welder and crane operator. Prior to June 17, he had never been disciplined for lateness. The only discipline he had ever received over the course of his employment was a write-up for not wearing a hard hat several months prior to his discharge. He was given a merit raise wage increase in February.

Stucker was employed for 5 years as a welder and a crane operator. Prior to June 17, he had never been disciplined for lateness. He was twice written-up for not wearing his hard hat on the job, although the dates of these incidents are not in the record.

C. Union's organizing activities

1. The January meetings

The union held its first organizing meeting in early January, at an employee's house. Approximately eight employees attended this meeting, including Housman. A second meeting was held on the morning of Saturday, January 19, at a local restaurant called Harper's. Housman, Stucker, Brown, and Davis attended the meeting along with approximately 11 other employees. At some point during the meeting, Guetterman entered the restaurant and said she wanted to attend. She was told by union representatives Fred Wagner and Claude Sadler that she was too high up in management and that she had to leave. Guetterman protested that she was an employee and should be allowed to stay. The representatives again told her to leave and she complied with their request. Brown observed Guetterman speaking with a few employees before she left, and Stucker and Davis both observed Guetterman looking around at the employees who were present. She was in the restaurant for approximately 10 minutes.

Guetterman explained her presence at the January meeting as follows:

> Some of the employees told me that there was a meeting, and a couple of them asked me if I was going to attend it. . . I didn't know anything about unions, and they had—the union people had contacted different employees. They had even come down to see Geoff Smith and talk to him in closed doors. No one had talked to me.

Geoffrey Smith was aware of the union's organizing activities in January and was also aware of Guetterman's attempt to attend the meeting at Harpers. Housman, Brown, and Davis all testified they spoke favorably about the union to other employees.

2. Respondent's employee meetings

From January to March, the union circulated seven 1-page flyers in support of its organizing efforts. Geoff obtained copies of each of these flyers and held meetings with employees in proximity to the time of each flyer's dissemination. At these meetings, Geoff read the text of the flyer and conducted question and answer sessions.

Geoff testified that in about mid-February, he was requested by several senior employees (none of the alleged discriminatees) to have a meeting of all employees so that they could discuss the union. Geoff agreed and all of Respondent's approximately 84 employees were asked to attend, even those who had the day off or were working different shifts. The meeting began at 7 a.m., and all employees were paid for their time. Geoff testified that it had been his intention that no supervisor or manager attend the meeting. That morning, however, three union representatives showed up at Respondent's offices. Geoff spoke with them for a time, and at some point employees invited him and the union representatives to join them.

During the course of the meeting, employee Harold Abbage called for employees who were in favor of the union to line up on one side of the room, and employees who were against the union to line up on the other side. The employees lined up as requested. Among those on the pro-union side were Housman, Stucker, Brown, and Davis. Brown recalled a couple of other employees were on the pro-union side; Stucker recalled about 20 employees stood on the pro-union side. Stucker testified Geoff and Guetterman were present in the room when the employees lined up. Geoff denied that he was present during the line up, and Guetterman was not asked any questions about her attendance at this meeting.

3. The employee petition

Sometime during the week of March 11, a petition was posted in the employee breakroom in the terminal, near the time clock, which read as follows:

> We no longer want to receive propaganda from the Laborers' International Union (union) in the mail. We no longer want union officials to call us at our homes. We have no interest in the union being our representative.

The petition was signed by 57 employees; none of the alleged discriminates signed it.

4. The March meeting at Harpers

Housman, Stucker, and Brown attended the third organizing meeting held at Harpers on the evening of March 20. Approximately 30 employees attended this meeting, including Lewis Williams, the dispatcher. Sadler and Wagner were present for the union. Williams videotaped the meeting and when employees spoke, he was observed speaking into the camcorder's microphone and identifying each speaker by name. Housman was asked by one of the employees what he thought of the union since Housman had been represented by the union in the past. Housman said he liked the union because employees would make more money and the union would stand up for their rights. During the meeting, Williams gave the union representatives a copy of the signed employee petition.

Guetterman was at the office that evening with the wife of employee Robert Bray. Bray had dropped his wife off at the office, and then went to Harpers to attend the meeting. Guetterman testified she spent the time filling out child-support questionnaires and talking with Bray's wife. Bray returned to the office between 9 and 9:30 p.m., picked up his wife and left. Guetterman remained at the office and three employees arrived to tell her that they had walked the 16 blocks from Harpers to the office because the three employees they had driven with to the meeting were still at Harpers drinking heavily. Williams arrived at the office and told the same story. Guetterman drove the four employees to Harpers in a company-owned vehicle. When she arrived, she saw the cars belonging to the employees who were reportedly drinking still in the parking lot. She did not immediately enter the restaurant, however, but remained inside the company vehicle. She watched two employees, Bert Johnson and Harold McClendon, leave the restaurant, go to their car, and then re-enter the restaurant. A few minutes later, Guetterman watched the same two employees exit the restaurant a second time, followed by Sadler and Wagner. She watched as Sadler and Wagner walked down the street, and she continued to sit in the company vehicle for several more minutes. Sometime after 10 p.m., Guetterman entered the restaurant, saw the employees drinking at the bar, and told them they needed to go home. The employees whom Guetterman had driven to the restaurant drove the intoxicated employees home. Guetterman was the only witness to testify to these events.

The next day, Williams showed Guetterman the videotape he had recorded during the meeting. Guetterman testified the reason she looked at the tape was because a question had been asked of the union representatives about why they had trespassed on Guetterman's property on a previous occasion. According to Guetterman, Williams keyed the tape to the spot when the question was asked, she viewed the question and answer, and the tape was turned off. Guetterman denied she viewed the entire videotape.

5. Respondent's newsletters

In March and April, Geoff Smith, Chris Smith, and David Jackson prepared two newsletters that were circulated to employees. In the March issue, acts of intimidation, theft, and vandalism were attributed to the union, and in a column entitled, "That A Boy Awards," several named employees were commended for opposing the union's efforts. In the April issue, awards were given to unnamed employees who went to the meeting at Harpers to get answers to their questions. With reference to that meeting, Geoff wrote, "I'm only sorry that the union organizers did not believe you were deserving of honest answers or in most cases, any answer at all. . . it was apparent that the union organizers could not correctly or truthfully answer a question."

D. May: Chris Smith/Davis conversation

Sometime in May, Davis and Chris Smith were working on a crane barge. Davis commented to Chris that it had been a while since they had heard anything from the union. According to Davis, Chris responded, "we don't talk about that on the job because it can get you in trouble." According to Chris, he told Davis he could not speak about that because he had to remain impartial. Smith added, "I said that as a representative of the company, that my dealings with the union had to be limited, and I could not speak any or voice any concerns one way or the other either pro or con."

E. May 31 incident at Mound City

On May 31, Davis, Stucker, and Jeremiah Henrichs were assigned to a job in Mound City, 12 miles north of Cairo. Their assignment was to operate a floating crane barge and offload soybeans from another barge into trucks. Because the river was dropping, the crane had to be stabilized. A tugboat was dispatched to perform that task, but before the pilot was able to complete the stabilization, he was called to another, higher priority assignment. He left at around 8 a.m. The radio on the crane barge was not working, and Davis, Stucker, and Henrichs were unable to use it to alert Chris Smith to the delay.

At 11:30 a.m., Chris Smith received a call from the customer complaining that the first truck had still not been loaded. Chris was unable to contact his crew because of the malfunctioning radio, and so he drove to Mound City. When he arrived, he observed the crane was not stabilized and had a tugboat dispatched to finish the job. The offloading did not begin until approximately 12 p.m.

On June 5, Chris called Davis into his office and Davis testified Chris told him that as the senior employee, he was holding him responsible for not taking adequate measures to contact him on May 31, and that he was suspending him for one day. According to Chris, Davis said he was just a peon and that it was not his responsibility. Chris testified that he told Davis, "[W] ell, if you think of yourself as a peon, then I will suspend you for a day so that you can think about what you did then."

On June 6 or 7, Chris called Stucker into his office to review what had happened on May 31. Chris said that as the crane operator, Stucker was in charge that morning and should have used better judgment. Stucker said he had no control over the tugboat pilot who left before the crane barge was fully aligned, and that he had no radio with which to communicate with Chris to notify him of the problem. Chris said he had planned on firing Stucker for this incident because he had caused the company to lose $24,000 in revenue. Stucker pointed out that prior to this incident he had twice asked Chris for a working radio

and Chris had failed to remedy the problem. Chris testified why he did not fire Stucker:

> Daniel had really impressed myself and Geoff. He was calm and real collected. So I did not fire him. I just told him – we expressed to him that from that point that we needed – the importance of his job. That, you know, the crane is the best profit margin that I have at my facility and that it is important that when we have cranes that we act professional and that we are there on time and that we do what we can in order to see that the job is done in a timely manner…He agreed, and we went about our separate ways.

Chris determined that he would not discipline Henrichs for what happened because he was a relatively new employee, having been employed only 8 months at the time of the incident.

F. Events of June 14

Stucker, Brown, and Leroy Adkins were instructed to report to work on Friday, June 14, at 6 a.m. Despite that instruction, all three employees clocked in late, at approximately 6:17 a.m.[3] Chris testified that because the three employees were late, the job was delayed and Respondent suffered a loss in revenue of $1,520.

On Monday, June 17, Chris suspended Stucker and Brown for 2 days, but meted out no discipline to Adkins. Later that day, Stucker and Brown went to the union hall and prepared a written statement in support of charges that were going to be filed with the Board. Stucker told Housman, his father-in-law, that he had gone to the union hall and prepared the statement.

Respondent maintains an employee handbook. The current version of that handbook, effective January 1, contains the following provision:

> Your punctual attendance is considered of great importance. If a manager or supervisor recognizes that you cannot be counted on, disciplinary action may be taken. This may involve any action management feels is appropriate, including termination.

Respondent also has a shipyard safety manual that sets forth five progressive disciplinary steps for employee lateness: verbal warning, written warning, one-day suspension without pay, three-day suspension without pay, and termination. Geoff testified this provision was not in effect in 2002 because it had been superseded by the employee handbook provision on attendance. Chris, however, testified that all of the provisions of the shipyard safety manual were, and continue to be, in effect for the employees he supervises.

G. Events of June 19

1. The morning

On the morning of Wednesday, June 19, as Housman was leaving the breakroom after Chris had given out the work orders for the day, Chris commented to him that it looked like he was going to have a short day. Housman replied, "well, what, are you going to suspend me and send me home?" Smith asked if he had a problem with the decision he had made to suspend Stucker and Brown and Housman said he had a big problem with it. Housman testified he told Chris that Adkins had punched in at the same time as Brown and Stucker, and no action had been taken against him. He also said another employee, Jerrod George, came in late every day and no action had ever been taken against him either. Housman then told Chris he was in trouble because Stucker and Brown had gone down to the union hall and filed a complaint with the NLRB. Chris said he didn't care and that he was just trying to be fair.

Chris testified Housman said he had a problem because he felt Chris had not backed up Brown and Stucker. Chris then recalled Housman stating as follows:

> A: …'Well, I'll tell you this and I'll tell you straight up front. You're in trouble.' And I said, 'I'm in trouble?' And he said, 'yes, you're in trouble. I'm going to give you a word of advice. If I were you, I would not be suspending anybody else.' And I said, 'Well, damn Louie, what did you want me to do? I had no choice.' And he goes, 'Well, I'll just tell you this. You've got a lot of men up here that are aggravated and highly upset with you, and we're not going to do anymore work than we have to…'
> Q: Did he say anything about what he was going to do the rest of the time?
> A: That they were not going to do any more than he had to do.
> Q: That he was not going to?
> A: Yes.

Housman denied ever making a statement that he or any other employee would not do any more work than necessary.

2. The afternoon

It is the usual practice for employees to clean up their work areas and pack up their tools starting at about 3 p.m. each day. At about 3:15 p.m., employees go to the breakroom where they fill out their daily logs, and they punch out at 3:30 p.m.

According to the General Counsel's witnesses, on the afternoon of June 19, at about 3:05 p.m., Davis, Stucker, and Brown had completed their assignment cleaning barges in the lower terminal area. They packed up for the day and, en route to the employee breakroom, they stopped to talk to employee Bert Rushing who was working in the same lower terminal area.[4] Rushing had finished his work and was getting ready to pack up. Davis, Stucker, and Brown testified their conversation with Rushing involved some joking around and a discussion about weekend plans. Rushing testified that in addition, Stucker and Brown also talked about their suspension. The employees' estimates of the length of this conversation ranged from 5 to 15 minutes. Following the conversation, the employees went to the breakroom to complete their daily logs, and there is no evidence that any of them punched out after the normal time of 3:30 p.m.

Chris Smith had been called to the lower terminal area by his assistant, Jerry Hammond, to attend to a problem with a barge. Chris testified that at about 2:40 p.m., as he was walking to-

[3] There is a dispute whether they were told to report for work at 5:30 or 6 a.m. There is no dispute that they were late.

[4] Rushing is the brother-in-law of Stucker and the son-in-law of Housman.

ward the lower end, he observed Davis, Brown, Stucker, Adkins, Wilbur Kline (a pilot) and Housman all "closing up shop and getting ready to, you know, clean up their area and report back to the office to do their logs." Housman tied up his vessel, and Adkins and Kline went to the break room to fill out their logs. Chris then saw Stucker, Brown, and Davis walk over and start talking to Rushing. It appeared to Chris that they had Rushing "penned up" and were intimidating him. He testified he watched this encounter for 35 minutes, from 2:40 p.m. to 3:15 p.m. at which point he walked over to the group. Stucker, Davis, and Brown walked away and Chris asked Rushing if anything was wrong because he looked upset. Rushing said nothing was wrong, he was not upset, and that they had just been talking about "normal stuff."

Chris later prepared a written statement of what he observed that day, in which he wrote that he had been called to the lower terminal by Hammond at 2:50 p.m. He continued:

> At about 15:00 I then noticed Tim, Frankie and Daniel head to the lower area where they cornered Bert Rushing. I thought nothing of it other than I looked that way again that their conversation was carrying on for quite a while. After about 15 minutes I then decided to find out what was going on. I turned to my left and asked Jerry what was going on and he stated that he believed they were trying to get Bert to sign a piece of paper or go with them to a lawyer…I approached Bert, I could see he was upset. I asked how he was doing, how his job was going, but something was bothering him.

On direct examination, Chris testified that this incident was of concern to him for two reasons: first, because Stucker, Davis, and Brown interfered with Rushing performing his work; and second, because the three employees had physically surrounded Rushing and he feared for Rushing's physical safety. On cross-examination, however, Chris conceded that all four employees, including Rushing, completed the work they were assigned to perform that day. He also admitted Rushing had not been intimidated.

At 4 p.m., Chris reported the incident to Geoff and expressed his concern that after having just spoken to Stucker, Brown, and Davis about their work performance, and having just suspended them, "they were back in—it seemed like we were going back down the same trail again." Geoff testified as a result of Chris' report, he was concerned that Rushing had been interrupted in his work and that he had been harassed. He decided to call Stucker, Davis, and Brown in the next day to give them a chance to explain what had gone on.

H. June 20

On the morning of June 20, Chris told Stucker, Davis, and Brown to stay in the breakroom after the other employees had been dispatched to their assignments. Housman asked Chris if he could stay, and Chris said, "OK, we'll do you first."

1. Housman's discharge

Housman went into the office where he met with Geoff, Chris, and David Jackson. According to Housman, he asked, "what's this all about?" but no one responded. Housman then asked why they had taken the word of the tugboat pilot over the word of Davis and Stucker about what had happened on May 31, at Mound City. Geoff responded that the pilot had reported that he had been advised by Davis and Stucker that the crane was stabilized before he left to perform his next assignment. Geoff also said that the tug coordinator verified the pilot's account. Geoff then asked Housman if he had told Chris that he was in trouble. Housman said, "Yes, he is in trouble. Tim and Daniel stopped by the Laborers Hall and filed a complaint with the NLRB." According to Housman, Geoff responded, "the NLRB ain't nothing, I ain't worried about it." Housman then shifted topics and said he did not like the company's new insurance plan. Geoff said Housman didn't have to worry about it because he was fired. Housman asked why and Geoff said it was because Housman was a detriment to the company, because he stirred up trouble, and because he talked to Chris the wrong way.

Jackson testified he had been asked by Geoff to sit in on his meeting with Housman. He recalled Chris asked Housman if he had told him that he was not going to do any more work than what he had to do, and Housman denied making any such statement. Housman talked about the fact that they had not backed up Stucker, and Housman said that Stucker and Brown had "sent papers to Springfield." Jackson denied that Housman made reference to the NLRB. On direct examination, Jackson was asked if Housman had said that Stucker and Brown had gone to the union hall, and Jackson responded, "I think he said they went up there the day before or something. I really don't—" On cross examination, he testified he was certain Housman mentioned that Stucker and Brown had gone to the union.

Chris testified that the first question Geoff asked Housman was why he had said he wasn't going to do any more work than he had to. Housman denied making that statement, and said it was lie. Geoff then said that the decision to suspend Brown and Stucker had been made by Chris and he asked Housman why he didn't trust Chris' judgment and why he had been insubordinate to Chris. Housman said that they had taken the word of the boat crews over that of Stucker and Brown. Geoff agreed and said that pilot had reported that the crane barge had been set up when he left it on the morning of May 31. Housman said that was a lie. The conversation turned to the subject of the company insurance plan and Housman said he didn't like it. Geoff said he didn't have to worry about it because he was terminated. According to Chris, Housman said several times, "I'm going to report you to Springfield," but Chris denied knowing what the reference to Springfield meant.

Geoff testified that the first issue he addressed was Housman's attitude and the manner in which he had spoken to Chris the day before. Housman did not respond to this, but changed the subject to what he perceived to be the unfair treatment of Stucker in connection with the May 31 incident. Geoff said that two pilots had reported to him that the crane barge had been fully set up, and Housman said that was a lie. Geoff then said he was concerned about the statement Housman had made to Chris that he was not going to do any more work than he had to do, and Housman said that Chris was a "God-damned liar." Geoff recalled Housman made the statement that "we were all in a lot of trouble because they had sent stuff to Springfield." Geoff testified he responded, "Louie, I don't know what 'stuff' is or 'Springfield' is. And I don't care. That's fine." Housman

changed the subject to the company insurance plan, and Geoff described his reaction:

> At this point, I feel just totally backed into a corner by Mr. Housman. You know, on how he is being with his immediate supervisor and the situation with him saying he's not going to do any more than he has to do, and he has nothing more than called a supervisor a God-damned liar about it, and knowing what kind of detriment this could be to the company, I told Mr. Housman that his services would no longer be needed at Waterfront.

Several minutes after giving this testimony, Geoff added to the reasons why he terminated Housman:

I made that decision based on what Chris Smith had reported to me and based on Mr. Housman's conduct in there. You know, Chris had informed me the first thing that morning what Housman had said. Later that afternoon, we followed up with a conversation where he was saying that he just really couldn't believe what Housman had said, but that, you know, he couldn't really pick a point in time, but you know, he tried to get a hold of Louie and he couldn't get a hold of him on the radio. That certainly wasn't normal. He had actually caught him in a pair of binoculars laying down on a barge over at our anchor fleet one day. You know, this certainly wasn't normal. And that he had seen dips in the revenue coming off the Doug Franklin aspect of the business. Based on this information that Chris Smith had given to me, as well as, you know, Housman's attitude and the way he responded to the questions, and you know, didn't even want to discuss what he had said about doing only what he had to do, I thought we were left with no choice and that if we wanted to remain a profitable company, we had to make a change.

2. Stucker/Brown/Davis interviews

Stucker, Brown, and Davis were then called into the office one by one. Each was asked to explain what they had talked about with Rushing, and each one said it was just a casual conversation. All three testified Geoff told him he was suspended pending an investigation, but that if it turned out Rushing had not been intimidated, each would be reinstated with backpay. Chris Smith corroborated their accounts and testified Geoff did commit to reinstate each employee if it turned out Rushing had not been intimidated. Geoff denied making these commitments.

I. Respondent's investigation into the terminal incident

Geoff told Chris to speak to the employees he supervised to find out if anybody else knew anything about the terminal incident. The next day, Chris presented Geoff with three employee statements. The first statement was from Rushing who wrote, "[T] hey was just talking about how come they had to go home Monday and to see what I was working on." The second statement was from Leroy Atkins who wrote, in relevant part,

> Well Chris asked me what was going on. And I honestly don't know much, but that some people seem to think that some people are treated differently than others. To my knowledge, that's what I really think is on their minds, but I don't know…I can truly say that I will miss these guys, I've learned a lot from them, and I hate to see them gone and I truly hope this matter can be resolved.

The third statement was from Jason Johnson who wrote:

> In general conversation, Lou and Frank said 'hang around a couple of weeks and things will get better around here.' The union guys are planning to make a move in a week or two. Nothing was actually said but it was understood that Chris was going out and Harold was coming back.[5] In several different opinions, we think the best thing to do is to terminate all of them to do away with the problem for good and to make it a better place to work!

Under questioning by Respondent's counsel, Chris testified that after the investigation was completed, he and Geoff determined that there had been no wrongdoing with respect to the Rushing incident:

> Q: You conducted an investigation and then you and Geoff met again?
> A: Yes.
> Q: And discussed what?
> A: What we wanted to do with these three individuals – the three individuals, we found no wrongdoing on the terminal, but we did find that we've had quite a few incidents.
> JUDGE KERN: You found – I'm sorry. I just didn't understand. You found wrongdoing or no wrongdoing?
> A: No. No wrongdoing.
> JUDGE KERN: You had found no wrongdoing with respect to Bert Rushing?
> A: Yes ma'am.
> Q: Okay. Go ahead.
> A: And do we want to continue to carry this load since we have had these incidents with the crane. I told them at that time I think, you know, that it was time to make a change, that we lost, you know, $24,000 on one job. We lost the respect – we are losing time and respect, and that I would rather start, you know, I would rather start with bringing in some different people.
> Q: And in terms of the incident with Bert Rushing, they were still not working for 30 minutes or 20 minutes. Correct?
> A: That's correct.
> Q: That was still an issue?
> A: That's correct.
> Q: When you are talking about it wasn't a problem in terms of any sort of intimidation toward Mr. Rushing. Correct?
> A: That's correct.

J. Stucker, Davis, and Brown's discharges

Geoff testified that he made the decision to terminate Stucker, Davis, and Brown, and he premised his decision on three factors: first, they had "goofed off" for 25 to 30 minutes on June 19; second, Stucker and Davis involvement in the May 31 crane incident had resulted in a $24,000 loss to the company; and third, Stucker and Brown lateness on June 14, had resulted in a $1,500 loss to the company. On June 25, Guetter-

[5] This reference is to Harold McClendon, the same individual Guetterman observed leaving the March 20 union meeting at Harpers.

man delivered letters of termination to the homes of Stucker, Davis, and Brown.

K. September 25 letter

In Geoff's opinion, Ed Smith has been engaged in an ongoing campaign to harm Respondent's business. He has exerted influence over the mayor of the city of Cairo to revoke the company's land leases, and he has gotten his mother, Geoff's grandmother, to sue Respondent seeking revocation of those leases. According to Geoff, Ed has attempted to harm the company by giving assistance to employees to file shareholder derivative actions.[6] In response to what Geoff described as employees' frustration with Ed's behavior, Geoff drafted a letter addressed to Terence O'Sullivan, president of the Laborers' International. It was a lengthy discourse on the history of Ed Smith's relationship with Respondent and with the union. In the opening paragraph, Geoff wrote:

> We have made it very clear to Ed and the union that we are not interested in their representation; however, he and the union continue to attack the company, our company, as part of a so-called organizing effort. We fully realize what Ed and the union have done to our company in the past, and we will outline those actions to you in this letter. In the end, we wish to be left alone to operate our company. We believe it is your duty, as well as that of the General Executive Board, to insure that Ed and the Laborers' Union bring no further harm to our company.

The letter went on to detail acts of misfeasance engaged in by Ed Smith toward Respondent, both as a former member of the board of directors, and as a representative of the union. Those acts included failing to pay employees overtime, cutting wages and benefits while at the same time drawing a salary for him and his wife, and breach of his fiduciary duties as a trustee of the administrative committee of the employee stock ownership plan. Geoff continued:

> Ed now wants to control our company and its finances again, and he is using the union as a means to his goal. We have repeatedly stated that we are not interested in his representation, but Ed does not want to listen to us. We furnished Claude Sadler and Fred Wagner with the enclosed petition on March 20, 2002 stating we did not want representation and wished to be left alone. . . We have made it clear that we are not interested in representation from Ed and the Laborers'. We have asked for our signature cards to be returned, and Ed has refused to do so. . . We ask that you have Ed Smith cease from using union resources to attack our company.

Geoff read the draft letter to all of Respondent's employees, addressing them in small groups. He answered questions and told employees they could chose to sign the letter or not to sign it. The letter was signed by 78 employees, supervisors, and members of management. It was sent to the International's president on September 25.

[6] Housman filed a shareholder derivative action on October 3.

IV. ANALYSIS

A. Credibility

Chris Smith's testimony was so seriously flawed by inconsistency that I conclude he was an untruthful witness. He testified that the day before his discharge, Housman said employees would not perform any more work than they had to. Chris perceived this as a threat of a work slowdown by the employees under his supervision. Chris then changed his testimony to say that Housman said only that he would not do any more work, and did not speak for other employees. This is no small distinction given that Housman's alleged statement was the pivotal reason for his discharge. Chris' confused recollection as to whether Housman said "we" or "I", coupled with Housman's denial that he made any such statement, leads to me to believe that Chris' attribution to Housman of a threat of a work slowdown was invented testimony. A second example of the self-contradictory nature of Chris' testimony relates to the Burt Rushing incident. On direct examination, Chris testified the encounter began at 2:40 p.m., 20 minutes prior to the start of the clean-up period, and continued for 35 minutes until 3:15 p.m. He also testified he had two concerns: first, that Stucker, Davis, and Brown were interfering with Rushing's work, and second, that they were physically threatening him. In a statement prepared shortly after the incident, however, Chris wrote that the conversation did not start until 3 p.m., the beginning of the clean-up period, and lasted only 15 minutes. He wrote that he thought nothing of the conversation and only approached the group after his assistant told him the employees were trying to get Rushing to sign a piece of paper or accompany them to a lawyer's office. Chris made no reference in this statement to any of the four employees not performing their work, or that he feared Rushing was in physical danger. Indeed, on cross-examination, Chris conceded that all four employees completed their work that day and that Rushing had not been intimidated.

Geoff Smith was as equally unimpressive a witness as Chris Smith. With respect to the mid-February meeting, I conclude from all the circumstances that this was a far more important meeting than Geoff Smith would have one believe, as this was no ordinary gathering. All employees were summoned, by Geoff, to attend this meeting, even those who were off duty that day. The meeting was conducted on Respondent's premises, employees were paid for their time, and, in essence, they were called upon to vote for or against the union in the presence of management and union officials. I discredit Geoff's self-serving testimony that he was not in the room when the line-up occurred, and I credit Stucker's testimony that Geoff was present. Another example of Geoff's lack of credibility was his testimony that in Housman's termination interview, he had no idea what Housman was talking about when he said he was going to report the company "to Springfield." If Geoff had not known what Housman was referencing when he used the term Springfield, logic would dictate that he would have asked Housman what he was talking about. He didn't ask, and the reason he didn't ask is because he knew, as Jackson knew, that Housman was referencing the union.

Geoff Smith and Chris Smith contradicted each other in material respects. Geoff testified that in making the determination

to terminate Housman, he considered Chris' complaints about Housman's work performance: that on one occasion Chris could not reach Housman by radio, that on another occasion he had caught Housman lying down on a barge, and that Chris had noticed dips in revenue from Housman's tugboat. Geoff's testimony was completely undermined by Chris' testimony that Housman had worked for him for a year, had always done his job well, and was a valuable employee who was highly respected in the industry. Another example of Geoff and Chris contradicting one another concerned the testimony about the company's shipyard safety manual. The manual sets forth a 5-step progressive discipline procedure for employee lateness. That procedure was not followed when Stucker and Brown were suspended for 2 days for a first-time lateness. Attempting to explain the disparity, Geoff testified this provision of the shipyard safety manual was no longer in effect. Chris directly contradicted Geoff and testified the provision was in effect for Stucker and Brown. Finally, during the suspension interviews with Stucker, Davis, and Brown on June 20, Chris testified Geoff told each employee he would be reinstated if the investigation disclosed no wrongdoing. Geoff denied making these commitments.

The General Counsel's witnesses were far more convincing. Considering that he was terminated after 29 years of employment, Housman testified in a surprisingly dispassionate, straightforward manner. I am aware that following his discharge he gained employment with the union and mindful of how that fact might affect his credibility. I nevertheless conclude that Housman's testimony was believable, and I credit his testimony in its entirety.

Stucker was also a credible witness. His demeanor on the witness stand was very much in line with Chris Smith's observations about Stucker as an employee: he was calm, collected, and an impressive young man. Notwithstanding the fact Chris considered Stucker the main person responsible for the May 31 incident that supposedly cost the company $24,000 in lost revenue, Stucker was so clearly valued by Chris and Geoff as an employee that no action was taken against him. He was an equally imposing witness and I credit his testimony.

I found Davis and Brown to be similarly open and cooperative during their testimony. They were poised and even-tempered on both direct and cross-examination. Like Housman and Stucker, what impressed me about all of these witnesses was their straightforward, matter of fact demeanor. The testimony of all four witnesses was consistent within the parameters of honest recollections, and they were credible, believable witnesses.

B. Animus

I discredit the testimony of Deborah Guetterman that she innocently went to the union meeting at Harpers on January 19, believing she was a rank-and-file employee entitled to attend. Her protest that she "didn't know anything about unions," is proved false by the fact that she was a voting member of the board of directors in October 2001 when Ed Smith was re-elected to the board as a result of his threats. Guetterman was also a member of the administrative committee that removed Ed Smith from the board of directors in January. When Guetterman entered the meeting at Harpers on January 19, she was a member of the board of directors, a member of the administrative committee, the human resources administrator, and an admitted agent of Respondent within the meaning of the Act. Her testimony that she naively believed she could attend the meeting was patently false, and I conclude her presence at the meeting was not by happenstance but by design. I credit the testimony of Brown, Stucker, and Davis that before she left the meeting, she looked around and observed the employees who were present and spoke to several employees. I therefore find she engaged in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act.

Guetterman's presence at Harpers on the night of March 20, was also not the result of fortuitous circumstance. Even accepting her dubious claim that the only reason she stayed at work until 9:30 p.m. was to work on child support questionnaires and to chat with an old friend, there was no reason for her to drive to Harpers. Guetterman testified that three employees walked to her office to tell her the employees who had driven them to the meeting were too intoxicated to drive. There is no testimony, however, that the fourth employee who came to her office that night, Lewis Williams, walked from Harpers. He could have driven the other three employees back to Harpers to attend to their inebriated mates. Or, Guetterman could have allowed the employees to drive a company vehicle back to Harpers. Or, they could have called a taxi. Or, they could have walked, the same way they came. There were any number of transportation arrangements that could have been made, and it was not necessary for Guetterman to personally drive them. Revealing of Guetterman's true intent, when she got to the restaurant parking lot, she did not immediately go inside. By her own admission, she sat in her car and watched as employees and union representatives entered and exited the restaurant. I find this conduct by Guetterman constituted surveillance of employees' union activities and violated Section 8(a)(1).

In May, Chris Smith responded to a comment made by Davis that they had not heard from the union in awhile. I credit Davis that Chris' response was that talking about the union on the job could get an employee in trouble. There is no complaint allegation relating to this statement, and the General Counsel did not move to amend the complaint. I therefore make no finding as to whether this statement constitutes an unfair labor practice. I do find that it was a clear expression of anti-union animus by an admitted agent and supervisor of Respondent.

C. Knowledge

There is ample evidence of Respondent's generalized knowledge of union activities engaged in by employees. Geoff Smith and Guetterman testified they were aware of the union's organizing activities that began in January, and from January to March, Geoff held meetings with employees to address representations made in the union's campaign literature. In February, Geoff sponsored and paid for employees to attend a meeting in the employee breakroom to discuss the union. In March and April, Geoff authored and circulated newsletters to employees in which he discussed alleged acts of misconduct by union representatives and singled out for recognition employees who opposed the union. In September, Geoff drafted a strongly

worded letter addressed to the International in which Geoff, writing in the first person, stated that "we" are not interested in union representation; that "we" provided the union with an anti-union petition; that "we" have asked for "our" signed authorization cards be returned; and that "we" ask that Ed Smith stop attacking the company. Geoff personally solicited the 78 signatures that appeared on that letter.

Respondent's specific knowledge of the union and protected activities engaged in by Housman, Stucker, Davis, and Brown is demonstrated in seven distinct ways. First, by her presence at Harpers on January 19, Guetterman was specifically aware of Housman, Stucker, Davis, and Brown's attendance at that meeting. Second, at the mid-February meeting, Geoff Smith and Guetterman witnessed the same four employees stand with approximately 20 other employees in support of the union; this group was a small minority of Respondent's workforce, approximately 25 percent. Third, I find Guetterman was aware of Housman, Brown, and Stucker's attendance at the March 20 meeting at Harpers, and of the fact that Housman's spoke out at that meeting in support of the union. Given her demonstrated lack of credibility, I reject Guetterman's claim that she did not view the entire videotape recorded by Lewis Williams at that meeting. In *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962), the Supreme Court, quoting from Judge Learned Hand, recognized the right of a trier of fact to believe the contrary of what an uncontradicted but discredited witness asserts, that is, the right to assume the truth of what is denied. After having engaged in surveillance of the January and March meetings at Harpers, it strains credulity that Guetterman would have declined the opportunity to view a videotape of the March meeting. I therefore conclude that Guetterman viewed the entire tape, and not just an excerpted portion, and Respondent is properly charged with the knowledge that Housman, Stucker, and Brown attended that meeting and that Housman's vocalized his support for the union. Fourth, on the morning of June 19, the credible evidence is that Chris Smith was told by Housman that Stucker and Brown had gone to the union hall the day before to file a complaint with the Board relating to their suspension. Fifth, on the afternoon of June 19, Chris was told by his assistant that Stucker, Davis, and Brown were encouraging Rushing to sign a piece of paper and to go with them to see a lawyer, corroborating Housman's earlier statement that charges were being filed with the Board. Sixth, on June 20, Chris obtained a written statement from Rushing stating that he, Stucker, Davis, and Brown had discussed Stucker and Brown's suspension. Seventh, on that same day, June 20, Chris obtained a statement from employee Jason Johnson stating that Housman and Davis had told him the union was planning on making a move within the next 2 weeks. Considering all of these factors, I find Respondent was aware of these four employees sustained support for the Union and was aware that Stucker and Brown had taken preliminary steps toward filing unfair labor practice charges with the Board.

D. Timing

Respondent contends that the organizing campaign ended abruptly in March and that that no inference of unlawful motivation can be drawn from the timing of the four employees' discharges in June. I disagree. The union's organizing effort continued to be a topic addressed by Respondent well after March. As previously discussed, in April, Respondent circulated an employee newsletter castigating the Union for being dishonest with employees. In May, Chris Smith told Davis that talking about the Union on the job could get him in trouble.

The credible testimony of Housman establishes that on the morning of June 19, he spoke to Chris about what he perceived to be Smith's unfair and disparate treatment of Stucker and Brown. He also told Chris that Stucker and Brown and gone to the union hall to file a complaint with the NLRB. The next morning, Housman again advocated on behalf of Stucker and Brown with Geoff, and repeated that they had gone to the union hall to file charges with the Board. He added that he too was going to make a report to the Union. A 29-year employee with a flawless employment history, Housman was fired on the spot.

On the afternoon of June 19, Chris saw Stucker, Brown, and Davis talking to another employee and was told they were talking about signing a piece of paper or going to a lawyer. The next morning all three were suspended. On June 20, Chris obtained a statement from an employee stating that Housman and Davis had told him the union was going to make a move within 2 weeks. Five days after obtaining that statement, Davis was discharged. Stucker and Brown, the two employees who had taken steps to file charges with the Board, were also discharged.

A strong inference of unlawful motivation is properly drawn from the timing of these events.

E. Wright Line

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. The General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The elements commonly required to support a finding of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, and employer animus. *Sears, Roebuck, & Co.*, 337 NLRB 443 (2002) and cases cited. Violations of Section 8(a)(4) are also analyzed using the *Wright Line* test. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002). An employer who discriminates against an employee on the belief that the employee has filed, or is about to file, charges with the NLRB violates Section 8(a)(4). *Metro Networks, Inc.*, 336 NLRB 63, 66 fn. 16 (2001).

Counsel for the General Counsel has established, by a preponderance of the evidence, that protected conduct engaged in by the four alleged discriminatees was a motivating factor in their discharges. The evidence establishes Respondent had specific knowledge of the four employees' support for the union's organizing effort. Its agents engaged in surveillance of those activities and threatened reprisals if employees talked about the union. Within 24 hours of Respondent's learning that Stucker and Brown had gone to the union hall to prepare a

statement in support of unfair labor practice charges, both employees were suspended, and 5 days later they were fired. Housman was fired minutes after he said he was going to report Respondent to the union. Five days after Respondent learned that Davis had told an employee that the union was about to make a move on the company, he was terminated. Counsel for the General Counsel has made out a strong prima facie case.

F. Respondent's defense of Housman's discharge

Respondent takes the position that Housman's discharge was the result of his threatening a work slow down. The argument is premised on Chris Smith's testimony that Housman told him on June 19 that he, or that he and other employees, were not going to do any more work than they had to. As previously discussed in the credibility section of this decision, I credit Housman over Chris Smith, and I find Housman never made any such statement. His discharge for this reason was therefore pretextual. This finding of pretext leaves intact the inference of wrongful motivation established by the General Counsel, *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001). Housman was discharged because of his union and protected activities in violation of Section 8(a)(1) and (3) of the Act.

G. Respondent's defense of Stucker, Brown, and Davis' discharges

Respondent contends that Stucker, Brown, and Davis engaged in repeated acts of misconduct and their discharges were the culmination of progressive discipline. The evidence proves otherwise.

In the case of Stucker, he was spoken to after the May 31 incident and reminded to perform his work in a timely manner. Chris testified he saw no need for further discipline. When Stucker was late to work on June 17, he was suspended for 2 days notwithstanding the fact that Respondent's lateness policy called only for a verbal warning for a first-time offense, and notwithstanding the fact that another employee who was also late to work that day received no discipline. Respondent argues that the misconduct engaged in by Stucker on June 19, triggered a review of Stucker's overall performance and led to the decision to terminate him. The credible evidence establishes, however, that Stucker did not engage in any misconduct on June 19. Respondent's reassessment of Stucker's past performance was therefore purely a pretext to mask Respondent's true motivation in terminating Stucker: he was supportive of the union and had taken steps to file charges with the Board. I find Stucker's discharge violated Section 8(a)(1), (3), and (4) of the Act.

With respect to Brown, Respondent takes the position that he was discharged because he was late on June 17, and because he engaged in misconduct on June 19. The credible evidence establishes that Brown did not engage in misconduct on June 19, and he had already been suspended for 2 days for being late. Respondent's reasons for discharging Brown were clearly pretextual. Brown was terminated because he was supportive of the union and because he, together with Stucker, had taken steps to file charges with the Board. Brown's discharge violated Section 8(a)(1), (3), and (4) of the Act.

According to Respondent, Davis was fired after 26 years of employment because of his involvement in the May 31 crane barge incident, and because he engaged in misconduct on June 19. The credible evidence establishes Davis did not engage in misconduct on June 19, and he had already been suspended for 1 day for the May 31 incident. Respondent's reasons for discharging Brown were pretextual. Davis was fired 5 days after Respondent learned that Davis had told an employee that the union was about to make a move on the company. His discharge violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent, by Deborah Guetterman, violated Section 8(a)(1) of the Act on January 19, 2002, and on March 20, 2002, by engaging in surveillance of employees' union activities.

Respondent violated Section 8(a)(1) and (3) of the Act on June 20, 2002, by discharging Louie Housman, and on June 25, 2002, by discharging Frank Davis.

Respondent violated Section 8(a)(1), (3), and (4) of the Act on June 25, 2002, by discharging Daniel Stucker and Timothy Brown.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged employees Louis Housman, Daniel Stucker, Timothy Brown, and Frank Davis, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

Respondent, Waterfront Services Co., Cairo, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of employees' activities on behalf of Laborers' International Union of North America, Local 773, AFL–CIO, or any other union;

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b). Discharging or otherwise discriminating against any employee for supporting Laborers' International Union of North America, Local 773, AFL–CIO, or any other union;

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision;

(c) Within 14 days from the date of this Order, remove from its files any reference to these unlawful discharges, and within 3 days thereafter, notify each employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Cairo, Illinois facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 11, 2002

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in surveillance of your activities on behalf of Laborers' International Union of North America, Local 773, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Laborers' International Union of North America, Local 773, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Louie Housman, Daniel Stucker, Timothy Brown, and Frank Davis, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their discharges will not be used against them in any way.

WATERFRONT SERVICE CO.